R v Mulkatana [2009] NTSC 52

PARTIES:	THE QUEEN
	v
	MULKATANA, Grant
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20815593
PARTIES	THE QUEEN
	v
	MULKATANA, Ernest
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	20813202
DELIVERED:	15 OCTOBER 2009
HEARING DATES:	14 – 28 JULY 2009
JUDGMENT OF:	REEVES J

CATCHWORDS:

Criminal Law – severance – whether count for murder can be joined with other counts – potential for complexities to distract the jury – possibility of

compromised verdicts – costs to the public of two trials – loss of time and stress and inconvenience caused to witnesses

Criminal Code (NT), ss 8, 43BG, 156, 188, 213, 309, 316, 341(1), Part II, Part IIAA

KRM v The Queen (2001) 206 CLR 221
R v Christou [1997] AC 117
R v Hofschuster (1993) 65 A Crim R 167

REPRESENTATION:

Counsel:

Plaintiff:	N Rogers
Defendants:	J Lewis (for Grant Mulkatana) B Braithwaite (for Ernest Mulkatana)

Solicitors:

Plaintiff:	Office of the Director of Public Prosecutions
Defendants:	Central Australian Aboriginal Legal Aid Service

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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT ALICE SPRINGS

R v Mulkatana [2009] NTSC 52
No. 20815593

BETWEEN:

THE QUEEN
Plaintiff

AND:

GRANT MULKATANA
Defendant

No. 20813202

BETWEEN:

THE QUEEN
Plaintiff

AND:

ERNEST MULKATANA
Defendant

CORAM: REEVES J

REASONS FOR RULING ON SEVERANCE

(Delivered 15 October 2009)

Introduction

[1] Ernest Mulkatana and his brother Grant Mulkatana were both charged with four counts on the one indictment. Those counts were as follows:

1. That each unlawfully entered a dwelling house at night with an intention to commit an offence contrary to s 213 of the *Criminal Code* (NT) ('*Criminal Code*');

2. That each assaulted Donella Hayes in circumstances of aggravation contrary to s 188 of the *Criminal Code*;

3. That each assaulted Jennifer Gorey in circumstances of aggravation contrary to s 188 of the *Criminal Code*; and

4. That each murdered Tarzan Loo contrary to s 156 of the *Criminal Code*.

[2] The Crown alleged that Ernest Mulkatana was the primary offender on all four counts. Grant Mulkatana was alleged to have aided and abetted Ernest Mulkatana on the murder count (under s 43BG of the *Criminal Code*) and formed a common intention to prosecute an unlawful purpose with him on Counts 1 to 3 (under s 8 of the *Criminal Code*). He was, therefore, alleged to have been the secondary offender on all four counts.

[3] All of the four counts against both accused arose out of a series of incidents that occurred over a short period of time at about 9.00 pm on 9 May 2008 at House 13 in the Hidden Valley Camp, Alice Springs.

[4] On 13 July 2009, just prior to the commencement of the trial against both accused, Mr Lewis, counsel for Grant Mulkatana, applied to have Counts 1 to 3 severed from the indictment so that Grant Mulkatana would initially

stand trial on Count 4 alone. Mr Braithwaite, counsel for Ernest Mulkatana, supported this application.

[5] After hearing submissions, I dismissed that application. At the time, I said I would give more detailed reasons at a later date. These are those reasons.

Section 341 of the *Criminal Code*

[6] Section 341(1) of the *Criminal Code* allows a court to order a separate trial on a count or counts in an indictment, where: 'the court is of the opinion that the accused person may be prejudiced or embarrassed in his defence by reason of his being charged with more than one offence in the same indictment or that for any other reason it is desirable to direct that the person should be tried separately for any offence or offences charged in an indictment'.

The contentions of the parties

[7] Mr Lewis did not submit that the indictment was prejudicial or embarrassing to his client in its present form, instead he submitted that Count 4 should be severed from the others for '[an]other reason'. The reason relied upon by Mr Lewis was that, if the four counts were to be heard together, that would give rise to some highly complex issues of law that would be likely to confuse and distract the jury from its consideration of the main count, the murder count.

[8] Mr Lewis accepted that the evidence relating to Counts 1 to 3 was relevant to Count 4 and he, therefore, accepted that the Crown would be able to lead

that evidence at any separate trial of Count 4.

[9] Ms Rogers, for the Crown, submitted s 316 of the *Criminal Code* did not preclude a murder charge being joined in an indictment with charges for other offences. Further, she said the Crown relied upon s 309 of the *Criminal Code* which allows charges for different or separate offences to be joined in the same indictment if they were founded on the same facts, or involve a series of offences committed in prosecution of a single purpose. Ms Rogers agreed that the issues of law involved in the four counts would be complex, because different provisions of the *Criminal Code* applied to matters such as complicity and intoxication in relation to the murder count, to those that applied to the other three counts. However, she submitted this could be dealt with by appropriate directions being given to the jury. She submitted this was the purpose of such directions in a criminal trial. Ms Rogers submitted the complexity involved would not be significantly reduced by severing Counts 1 to 3, whereas significant costs and resources would be wasted if Counts 1 to 3 were to be dealt with at a separate trial because it would be necessary to call the same evidence twice. This would also lead to inconvenience for the witnesses in that they would be required to give their evidence about the events on 9 May 2008 twice.

The principles on severance

[10] In *KRM v The Queen* (2001) 206 CLR 221, McHugh J described the factors to be weighed one against the other, when deciding whether to sever counts from an indictment, as follows (at 235):

> ‘Ordinarily, however, the court should order separate trials where … the joinder of charges creates a risk of prejudice. (*Sutton v The Queen* (1984) 152 CLR 528 at 531, 541-542; *De Jesus v The Queen* (1986) 61 ALJR 1 at 3,7,8; 68 ALR 1 at 4-5, 12, 13). But in some cases, an application for the trial of separate counts may be refused on the ground that the convenience of trying the charges together far outweighs any risk of prejudice or, more usually, because a separate trial is not sought. (See, eg, *R v T* (1996) 86 A Crim R 293) If that occurs, a propensity warning will almost certainly be required.’

[11] In *R v Christou* [1997] AC 117, Lord Taylor (at 129) gave a more detailed summary as follows:

> ‘They will vary from case to case, but the essential criterion is the achievement of a fair resolution of the issues. That requires fairness to the accused but also to the prosecution and those involved in it. Some, but by no means an exhaustive list, of the factors which may need to be considered are: - how discrete or inter-related are the acts giving rise to the counts; the impact of ordering two or more trials on the defendant and his family, on the victims and their families, on press publicity; and importantly, whether directions the judge can give to the jury will suffice to secure a fair trial if the counts are tried together.’

[12] Because it is a case which deals with severance under the *Criminal Code*, both counsel referred me to the decision of Mildren J in *R v Hofschuster* (1993) 65 A Crim R 167 (‘*Hofschuster*’). In that case, the indictment contained four counts: one of murder, one of attempted murder and one of attempting to cause grievous harm, all relating to one Stajan Versic, together with a fourth count of endangering the life of certain police officers with intent, unlawfully to kill. The events to which the indictment related occurred on the same night over the course of approximately one hour and involved several different episodes. The indictment, therefore,

included two attempted murder charges: one on Stajan Versic and the other on certain police officers.

[13] Taking into account the alternative verdicts of manslaughter and dangerous act that were available on various of the counts, if the indictment stood, there were eight separate offences the jury would have to consider: see at 168.

[14] After tracing the history of the joinder of counts in indictments in England, other jurisdictions in Australia and in the Northern Territory – before and after the advent of the *Criminal Code* on 1 January 1984 – and considering various provisions of the *Criminal Code* including ss 309 and 316 (at 169 – 172), his Honour concluded that:

- s 316 did not preclude the joinder of counts permitted to be joined by s 309 to a count of murder in an indictment: see at 173;
- the offences in the case before him were all either founded on the same facts, or involved a series committed in the prosecution of a single purpose: see at 174; and
- the indictment should not be quashed as vexatious and embarrassing under s 339(1)(a) of the *Criminal Code*: see at 175.

[15] Mildren J then went on to consider whether a separate trial should be ordered of the murder count under s 341. His Honour outlined the difficulties that then existed under the *Criminal Code* associated with

charges of murder, manslaughter, and a dangerous act under s 154, particularly the differing legal tests relating to the 'reasonable person' and to 'intoxication' under those provisions: see at 175 – 176. Mildren J observed that because intent, provocation and self-defence were all relevant to the murder charge, the issues to be tried in relation to it were both serious and complex: see at 176. His Honour then concluded that, because the attempted murder charges also required intent to kill, those charges 'are liable to distract the jury from their main task': see at 176. He went on to outline some of the difficulties the jury would have to contend with, as follows (at 176):

> 'Thus a jury would be required to consider the state of mind of the accused at three separate stages, leading to the risk of compromised verdicts. In relation to each stage, the defences will not necessarily be the same. Provocation for instance seems to be inapplicable to count 4, although as mistake may well arise, it is by no means impossible, and in this situation provocation can be an absolute defence, and not merely a defence which reduces murder to manslaughter as in the case of count 3 (see s 34(1)). If it does arise, there are also conceptual difficulties in distinguishing between "acts not likely to cause death or grievous harm" on the one hand (s 34(1)(e)), and "an act likely to endanger human life" (s 165(b)) on the other. Finally, dangerous act is an alternative to counts 1 and 2 and would also have to be separately considered, with the relevant circumstances of aggravation under s 154(4).'

[16] Having regard to these difficulties, after weighing up the costs to the Crown involved with separate trials, which he thought would not be significant because only a few witnesses were involved, most of whom were police officers, Mildren J ordered that there be a separate trial on the murder count.

Consideration

[17] In this case, I consider the balance tips the other way and the additional costs that will be incurred for the public and the inconvenience caused to the witnesses outweigh any difficulties the jury may have in dealing with the complexity of the legal issues involved. I have set out hereunder, in more detail, the factors that have led me to that conclusion.

[18] In *Hofschuster*, much of the difficulty appeared to arise from the fact that an offence under s 154, of committing a dangerous act, was an alternative verdict to at least two of the charges. Here, since s 154 of the *Criminal Code* was repealed some time ago, the only alternative verdict is one of manslaughter, to the murder count.

[19] Furthermore, in *Hofschuster*, the jury had to consider the accused's state of mind at three separate stages over a period of one hour during the night in question. Moreover, the jury had to consider two attempted murder charges in relation to two different victims, or a group of victims in relation to the police officers. By comparison, in this case, the jury will be required to consider the state of mind of the accused at essentially one point in time, over a period of minutes, in relation to one victim, Tarzan Loo.

[20] While there will certainly be some complexity arising from the difference between the provisions that apply in relation to criminal responsibility for the murder counts, set out in Part IIAA of the *Criminal Code*, as compared

to the equivalent provisions in Part II as they apply to the other three counts, I do not consider this involves anything like the complexity that arose in *Hofschuster*. Moreover, I consider that this complexity can be addressed by my giving careful directions to the jury.

[21] Finally, and most significantly, in *Hofschuster* there were only a few witnesses involved and most of those witnesses were police officers. Here, it is expected that there will be more than twenty witnesses, the vast majority of whom will not be police officers. Many of the witnesses will be Aboriginal people, of whom many will be giving evidence through an interpreter. It follows that, if there are to be separate trials on Count 4 and Counts 1 to 3, not only will there be considerable expense caused to the public by all these witnesses having to be called to give their evidence twice, but the witnesses themselves will obviously have to devote twice the amount of time that they would otherwise, and suffer the obvious inconvenience of having to attend court and give their evidence twice.

[22] Furthermore, in the case of Jennifer Gorey, she will have to suffer the stress and anguish of having to recount, on two occasions, the events of 9 May 2008 when her partner, Tarzan Loo, was allegedly assaulted and killed. The same applies to the other occupants of House 13 on the night of 9 May and the members of Tarzan Loo's family, who are to be called as witnesses.

Conclusion

[23] So, on balance, I do not consider the distraction that may beset the jury arising from the complexity in the legal issues involved in hearing these four counts together, provides a sufficient justification to sever Counts 1 to 3 from the indictment when one takes into account the additional costs, time lost, inconvenience and stress that will flow from that course, as outlined above.

[24] For these reasons I dismissed Mr Lewis' application to sever Counts 1 to 3 from the indictment.